Nebraska Law Review

Volume 81 | Issue 2 Article 6

2002

Justifying Capital Punishment in Principle and in Practice: Empirical Evidence of Distortion in Application

Robert F. Schopp
University of Nebraska–Lincoln

Justifying Capital Punishment in Principle and in Practice: Empirical Evidence of Distortion in Application

*Robert F. Schopp**

* Professor of Law and Psychology, University of Nebraska.

I. INTRODUCTION

Some Supreme Court opinions overturn capital sentences or reason that such sentences should be overturned due to inappropriate patterns of application, although the Justices writing these opinions apparently accept capital punishment ("CP") as constitutional in principle. In a widely-recognized opinion, Justice Blackmun announced that he would no longer accept CP as constitutional under the Eighth Amendment by stating, "I no longer shall tinker with the machinery of death."[1] He previously accepted CP as constitutional, however, and apparently continued to see it as constitutional in principle.[2] Three of five concurring Justices in *Furman* overturned the capital sentences at issue in that case due to arbitrary or discriminatory application, although they did not contend that CP violates the Constitution in principle.[3] Two of these three Justices later upheld CP as constitutional when appropriately applied.[4] A fourth Justice in *Furman* concluded that CP violates the Constitution in principle, but he also concluded that CP violates the Constitution in practice due to discriminatory application. Thus, the reasoning that supports this Justice's conclusion of unconstitutionality in practice is distinct from the reasoning that supports his conclusion of unconstitutionality in principle.[5] This series of opinions reflects the general proposition that distortion in application can render CP unconstitutional in practice, independently of the conclusion that it is constitutional or unconstitutional in principle.

Empirical studies can inform the evaluation of CP as constitutional or justified as applied. Such studies pursue systematic descriptive information regarding the manner in which institutions have functioned across the period examined. In this manner, they can reveal descriptive information relevant to a constitutional or justificatory analysis of the specific institutions of CP studied. This information might include, for example, evidence suggesting patterns of sentencing that reflect constitutional criteria, such as culpability, or illegitimate criteria, such as race or socioeconomic status of the victim. Empirical inquiry can also provide information regarding the likelihood of miscarriages of justice by specified criteria or of the failure of procedural matters such as jury comprehension of instructions or competence of represen-

1. Callins v. Collins, 510 U.S 1141, 1145 (1994), *denying cert. to* 998 F.2d 269 (5th Cir. 1993) (Blackmun, J., dissenting).
2. *Id.* at 1158-59; Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Blackmun, J., concurring); Furman v. Georgia, 408 U.S. 238, 405-14 (1972) (Blackmun, J., dissenting).
3. *Furman*, 408 U.S. at 240-57 (Douglas, J., concurring); *id.* at 306-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring).
4. *Gregg*, 428 U.S. at 158-207 (Stewart, J., plurality opinion); *id.* at 207-27 (White, J., concurring); *id.* at 227 (Blackmun, J., concurring).
5. *Furman*, 408 U.S. at 314-71 (Marshall, J., concurring).

tation. Such inquiry can provide information regarding the manner in which an institution is currently applied, and this information might contribute to a variety of additional analyses. Empirical evidence might demonstrate the manner and degree in which an institution conforms with or departs from some independently supported principles of justice. Empirical inquiry might provide information regarding the causal factors that promote consistency with, or departures from, these principles of justice. Studies examining comprehension of jury instructions, for example, might reveal failures of comprehension that might explain jury failure to consistently apply legal standards.[6] Studies examining the effectiveness of various attempts to render jury instructions more comprehensible might provide information regarding what types of revisions are likely to promote application of CP in a manner that is more consistent with legal standards or with defensible principles of justice.[7]

Empirical inquiry *in itself* cannot provide answers to constitutional or justificatory questions. Empirical data cannot determine, for example, whether CP (or any other human institution) is or is not constitutional in principle or whether it is or is not justified in principle. These matters require constitutional interpretation or analysis of defensible principles of moral justification. Empirical inquiry can contribute to our understanding of the manner in which various institutions function, but it cannot provide the appropriate principles of justice to apply in evaluating such institutions in principle or in practice. Nor can empirical data establish the types or degrees of departure from these principles of justice that are sufficient to render unjustifiable in practice an institution that is justifiable in principle. In short, interpreting the significance of empirical evidence requires integration of that evidence with the constitutional or justificatory analysis.

This Article examines this integration in order to clarify the manner in which empirical data describing an institution in practice can inform the constitutional and justificatory questions. It seeks to clarify the relationship between justification in principle and in practice in order to clarify the manner in which empirical data demonstrating inappropriate application can support either (1) the conclusion that an institution that is constitutional or just in principle should be applied in a more defensible manner, or (2) the conclusion that an institution that is constitutional or just in principle should be abolished as unconstitutional or unjust in practice due to distortions in application. I make no attempt to demonstrate that CP either is or is not constitu-

6. *See, e.g.*, Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 224-26 (1996) (explaining research of jurors' abilities to understand jury instructions).

7. *Id.* at 226-32.

tional or just in principle or in practice. Rather, I attempt to clarify the significance and limitations of empirical inquiry for the analysis of the constitutionality or the justification of CP in practice. Part II reviews and clarifies some central judicial opinions that address the significance of distortions in application for constitutionality in practice. Parts III through V address three types of arguments regarding the relationship between constitutionality or justification in principle and in practice that appear explicitly or implicitly in judicial opinions and in the literature. Each of these Parts examines a particular type of argument in order to evaluate the persuasive force of that type of argument and the appropriate role of empirical data in that type of analysis. Part VI concludes the paper.

II. JUDICIAL OPINIONS: INAPPROPRIATE APPLICATION

A. Justice Blackmun in *Callins*

Justice Blackmun announced that he would "no longer . . . tinker with the machinery of death" approximately twenty years after he dissented from the Court's decision overturning capital sentences under discretionary CP statutes.[8] His dissenting opinion in *Furman* made it clear that although he personally objected to CP and would reject it in a legislative role, he found the claim that it violated the Eighth Amendment unpersuasive.[9] Similarly, his concurring opinions in *Gregg v. Georgia* and the other 1976 cases reaffirmed his view that CP falls within the range of punishments authorized under the Constitution.[10] In explaining his conclusion that CP violates the Eighth Amendment of the Constitution twenty years after rejecting that view, Justice Blackmun emphasized the difficulties encountered in attempting to apply CP in an acceptable manner. He reasoned, "The inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution."[11] He reasoned that these defects in application render CP unconstitutional because, "it surely is beyond dispute that if the death penalty cannot be administered consistently and rationally, it may not be administered at all."[12]

Although Justice Blackmun's opinion in *Callins* concluded that CP violated the Constitution in practice, he apparently continued to rec-

8. Callins v. Collins, 510 U.S. 1141, 1145 (1994), *denying cert. to* 998 F.2d 269 (5th Cir. 1993) (Blackmun, J., dissenting).
9. *Furman*, 408 U.S. at 405-14 (Blackmun, J., dissenting).
10. *Gregg*, 428 U.S. at 227 (Blackmun, J., concurring); Jurek v. Texas, 428 U.S. 262, 279 (1976) (Blackmun, J., concurring); Proffitt v. Florida, 428 U.S. 242, 261 (1976) (Blackmun, J., concurring).
11. *Callins*, 510 U.S. at 1145-46.
12. *Id.* at 1147.

ognize CP as constitutional in principle. His discussion of the "fair, consistent, and reliable sentences of death required by the Constitution"[13] clearly contemplated circumstances under which the administration of CP would conform to the Constitution. Furthermore, he explicitly recognized the possibility that constitutional administration of CP might someday be achieved. "Perhaps one day this Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital sentencing scheme."[14] He concluded, however, that CP in practice did not conform to the requirements of constitutional CP, and he expressed his doubt that the Court would succeed in developing standards or procedures that would successfully establish in practice an institution of CP that conforms to constitutional requirements. Thus, he expressed the hope that the Court would eventually join him in concluding that CP cannot be applied within the parameters required by the Constitution.[15]

Although Justice Blackmun apparently accepted the proposition that distortion in application can render unconstitutional an institution that is constitutional in principle, he provided no indication regarding the types, degrees, or sources of errors that are sufficient to render such an institution unconstitutional. He clearly indicated that consistency, fairness, rationality, and reliability are important, but he provided no indication regarding the types or degrees of defects in these areas that are sufficient to render CP unconstitutional in practice. Thus, he provided no guidance regarding the criteria or standards of adequacy that an institution of CP must meet in practice in order to conform to the requirements of constitutionality in principle.

B. The Roots in *Furman* and the 1976 Cases

The Court initiated the contemporary era of CP cases in 1972 when a fragmented Court overturned capital sentences under statutes that allowed unguided discretion in capital sentencing. Five Justices who wrote five separate concurring opinions in support of the judgment supported the judgment overturning the sentences in *Furman*. Two of those opinions, authored by Justices Brennan and Marshall, contended that CP is unconstitutional in principle.[16] Both opinions included arbitrary or discriminatory application in the reasoning they employed to reject CP.

13. *Id.* at 1146.

14. *Id.* at 1159.

15. *Id.* ("I am . . . optimistic . . . that this Court eventually will conclude that . . . 'the death penalty . . . must be abandoned altogether.'" (quoting Godfrey v. Georgia, 446 U.S. 420, 442 (1980) (Marshall, J., concurring))).

16. Furman v. Georgia, 408 U.S. 238, 257-306 (1972) (Brennan, J., concurring); *id.* at 314-71 (Marshall, J., concurring).

Justice Marshall's opinion appeared to conclude that arbitrary or discriminatory application renders CP unconstitutional in practice, independently of the arguments that he advanced as rendering it unconstitutional in principle. Justice Marshall reasoned that CP violates the Eighth Amendment in principle because it is excessive in that it is unnecessary for any legitimate penal purpose.[17] He also concluded, however, that even if CP did not violate the Eighth Amendment in principle as excessive, it would violate the Eighth Amendment because the citizenry of the United States would find it morally unacceptable. His analysis supporting this conclusion did not rely on the premise that the majority of U.S. citizens rejected CP at the time *Furman* was decided. Rather, he reasoned that most Americans would find CP shocking to their consciences and senses of justice if they understood that CP was applied in a discriminatory manner that was prone to erroneous convictions and capital sentences.[18] This second line of reasoning resembles the reasoning of Justice Blackmun in *Callins* in that it contends that distortions in application render CP unconstitutional, independently of one's reasoning regarding the constitutionality of CP in principle.

Justice Brennan's opinion in *Furman* revealed a similar pattern. He concluded that CP is unconstitutional in principle and that arbitrary and discriminatory application renders it unconstitutional in practice. Justice Brennan reasoned that CP violates the Eighth Amendment in principle because it violates human dignity through the gratuitous infliction of suffering for no legitimate penal purpose.[19] His analysis differed from that of Justice Marshall in that he did not explicitly contend that arbitrary or discriminatory application would render CP unconstitutional in practice, independently of its constitutionality in principle. Rather, he contended that CP violated the Constitution in principle partially because it was imposed rarely and arbitrarily.[20] Thus, Justice Brennan addressed arbitrary application as one factor in the comprehensive analysis of the constitutionality of CP without clearly distinguishing the claim that it violated the Constitution in principle from the claim that it violated the Constitution in practice.

Three other concurring Justices overturned the sentences at issue in *Furman* due to the risk of arbitrary or discriminatory application under these statutes. They did not find CP unconstitutional in principle, but they did find that it violated the Constitution in practice due

17. *Id.* at 314-59 (Marshall, J., concurring).
18. *Id.* at 360-69.
19. *Id.* at 269-306 (Brennan, J., concurring).
20. *Id.* at 291-95.

to arbitrary or discriminatory application.[21] Two of these Justices later explicitly recognized CP as constitutional in principle when they upheld revised CP provisions in *Gregg*.[22] The opinions of these two Justices in *Furman* and *Gregg* converge with Justice Blackmun's opinion in *Callins* in that they acknowledged CP as constitutional in principle but concluded that certain distortions in application can render it unconstitutional in practice. These opinions diverge from Justice Blackmun's opinion in *Callins* in that these Justices overturned capital sentences that were applied under statutes that operated in this unconstitutional manner, but they drew no inference about CP as a general type of institution. Although the precise scope of Justice Blackmun's opinion is not completely clear, he apparently concluded that while CP was, or could be, constitutional in principle, either it could not be applied in a manner that converged with the Constitution or constitutional application was so unlikely that he was justified in refusing to continue to "tinker" with the process.

C. Principle and Practice

It is important to distinguish three levels of generality at which one might declare punishment unconstitutional. At the most general, one might conclude that any institution of this type violates the Constitution. Justices Brennan and Marshall, for example, concluded in *Furman* that any institution of CP violates the Eighth Amendment because it serves no legitimate penal purpose.[23]

At the most specific level, an opinion might declare a specific capital sentence unconstitutional because that sentence was handed down in an unconstitutional manner due to defective instructions, representation, or procedure. The *Penry* Court, for example, overturned the sentence in that case because it had been handed down in circumstances that prevented proper consideration of the mitigating effect of mental retardation, but the Court explicitly rejected the claim that the Eighth Amendment categorically precluded CP of mentally retarded people.[24] Thus, the Court overturned that particular capital sentence for that particular offender under that particular sentencing provision, but the reasoning did not suggest that the general institution of CP violates the Constitution.

---

21. *Id.* at 240-57 (Douglas, J., concurring); *id.* at 306-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring).

22. *Gregg*, 428 U.S. at 158-207 (Stewart, J., plurality opinion); *id.* at 207-27 (White, J., concurring).

23. *See supra* notes 16-19 and accompanying text.

24. Penry v. Lynaugh, 492 U.S. 302, 340 (1989) ("But we cannot conclude . . . that the Eighth Amendment precludes the execution of any mentally retarded person . . . simply by virtue of his or her mental retardation alone.").

The Court's recent decision in *Atkins v. Virginia* ruled that evolving standards of decency now preclude capital punishment of mentally retarded offenders.[25] The Court's decision in *Atkins* leaves intact the reasoning in *Penry* insofar as *Penry* stands for the proposition that instructions that prevent the sentencer from considering and giving effect to relevant mitigating evidence render the resulting capital sentence unconstitutional, independently of any claim that CP as such violates the Constitution.

The plurality in *Woodson* overturned a capital sentence handed down under a provision that mandated CP for certain crimes.[26] The plurality's reasoning in that case would apply to any statute that mandated CP for any offender who committed specified crimes without allowing individualized assessment of the offender's character and record.[27] Similarly, the majority opinion in *Ring v. Arizona* overturned a capital sentence because the sentencing procedure did not provide for a jury determination regarding a finding of fact that rendered the offender eligible for CP.[28]

Although the decisions in *Penry*, *Atkins*, *Woodson*, and *Ring* directly addressed capital sentences handed down to the specific offenders or categories of offenders in those cases, the reasoning would apply to any capital sentence handed down under relevantly similar provisions to relevantly similar offenders. These cases remain specific, however, in that they address only capital sentences applied in a specified manner or to specified categories of offenders. They neither draw conclusions nor suggest inferences regarding CP in general.

Justice Blackmun's opinion in *Callins* and Justice Marshall's opinion in *Furman*, in contrast, appear to address an intermediate level of generality, in that they concluded that certain defects in application render the general institution of CP in violation of the Eighth Amendment. Although they directly address specific types of defects in the application of CP, Blackmun and Marshall apparently drew conclusions regarding the general category of CP rather than regarding specific capital sentences or specific types of capital sentencing provisions. That is, these Justices in these opinions declared CP in general unconstitutional due to certain types of defects in the manner in which a variety of specific institutions of CP had been applied. They rested these conclusions regarding the general category of CP on their perception of a tendency toward distortion in application, independently of any claim that CP violates the Eighth Amendment in principle.

25. Atkins v. Virginia, 122 S. Ct. 2242, 2252 (2002).

26. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

27. *Id.* at 303-05.

28. Ring v. Arizona, 122 S. Ct. 2428 (2002).

Throughout the remainder of this Article, I refer to the most general level of discussion as addressing CP in principle and to the most specific level of discussion as addressing specific capital sentences, specific categories of offenders, specific capital sentencing provisions, or specific types of capital sentencing provisions. I refer to the intermediate level of generality as addressing CP in practice. According to this terminology, the Court overturned specific sentences of CP in *Woodson* and *Penry*, precluded capital sentences for a specific category of offenders in *Atkins*, and ruled unconstitutional specific types of sentencing provisions in *Woodson* and *Ring*. Justices Brennan and Marshall contended that CP violated the Eighth Amendment in principle in *Furman*. The opinions of Justice Blackmun in *Callins* and Justice Marshall in *Furman* concluded that CP violated the Eighth Amendment in practice.

Similar patterns of argument can appear regarding moral justification. At the most specific level, one might argue that specific capital sentences, specific types of capital sentencing provisions, or capital sentences for specific categories of offenders are just or unjust. At the most general level, one might argue that CP is just or unjust in principle. At the intermediate level of generality, one might argue that even if CP is morally justified in principle, human institutions are incapable of applying it in a justified manner or unwilling to do so. According to this reasoning, CP would be unjust in practice regardless of whether it is just or unjust in principle according to the most defensible moral arguments.[29] One might argue that this position reflects the principle contained in the quote, "Vengeance is Mine, I will repay, says the Lord."[30] According to this interpretation, CP resembles vengeance as represented in this quote in that each might be justifiable in principle, but the required precision of moral judgment is beyond that which human beings or human institutions are willing and able to exercise. Some commentary suggests this line of reasoning in that the writers argue that the fallible, discriminatory institution of CP that we actually practice renders CP in practice unconstitutional and unjust, independently of any resolution to the debate regarding the constitutionality or justification of CP in principle.[31]

29. MARK COSTANZO, JUST REVENGE 136, 142 (1997); Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670 (1986); Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 451-59 (1998).

30. *Romans* 12:19 (NAS).

31. *See* sources cited *supra* note 29.

D. Empirical Evidence

Insofar as one argues that CP is unconstitutional or unjust in practice due to distortions in the application of CP, empirical evidence regarding the manner in which the institution is actually applied is relevant to the argument. Empirical studies can provide one source of relatively reliable evidence regarding distortions in application such as discrimination in sentencing according to the race or socioeconomic status of the defendant or victim.[32] One might draw either of two distinct inferences from empirical evidence supporting the contention that a particular institution is applied in a manner that violates the applicable principles of constitutionality or of justice. First, one might conclude that we ought not continue to apply it in this manner, and therefore, that we should revise the practices through which we apply CP in order to render it more consistent with the underlying standards or values that render it constitutional or just in principle. Alternately, one might conclude that we ought not continue to apply it in this manner, and therefore, that we should abolish CP. The opinions of Justice Blackmun in *Callins* and Justice Marshall in *Furman*, as well as some commentators mentioned earlier, apparently endorse this latter conclusion. These sources appear to reflect the proposition that distortions in application render the institution of CP unconstitutional or unjust in practice, regardless of whether it is constitutional or just in principle.

The more limited conclusion is not controversial. Supporters and opponents of CP can agree that we ought not apply CP in an arbitrary, discriminatory, or otherwise unconstitutional or unjust manner. They can also agree that we should do what we can to correct such distortions in practice. The alternative conclusion, that distortions in application require abolition as unconstitutional or unjust in practice, is more controversial. Given the prolonged and apparently intractable debate regarding the constitutionality and justification of CP in principle, a persuasive argument for the claim that distortions in application render CP unconstitutional or unjust in practice, regardless of the answer to the debate in principle, has the advantage of providing a resolution to the practical question without requiring resolution of the apparently intractable question of principle. What reasoning might support the contention that distortions in application require abolition, rather than efforts to reduce these distortions, regardless of constitutionality or justification or lack thereof in principle? The

32. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 140-97 (1990) [hereinafter EJDP]; David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 NEB. L. REV. 486, 562-623 (2002) [hereinafter *Nebraska Study*].

following three Parts evaluate several possible arguments for this conclusion.

III. CP AS CONSTITUTIONAL OR JUST ONLY IF APPLIED PRECISELY

A. The Initial Argument

One might advance an argument of the following type for the proposition that any distortion in application requires abolition of CP. The legitimate penal purposes that render CP constitutional or the moral principles that render it just do so only if CP serves those legitimate penal purposes or conforms to those principles. An institution of CP that deviates in practice from those legitimate penal purposes or moral principles cannot derive support from them. Thus, CP is constitutional or just if it is applied precisely as required by the principles that render it constitutional or just in principle, but it ceases to meet constitutional or moral standards if it deviates in any manner from those standards. That is, constitutionally legitimate penal purposes and moral principles that justify CP according to constitutional or moral criteria, respectively, justify it only if it can be applied in precise conformity with these principles. Thus, any distortion in application undermines the justification in principle and renders the institution unconstitutional or unjust in practice.

Consider first the variation of this argument that addresses constitutionality. A constitution provides the fundamental principles that organize and govern the legal institutions of a state. These principles define the parameters of the sovereign power of government and prescribe the manner in which that power may be exercised.[33] The Constitution of the United States provides for the division and separation of powers among various branches and levels of government partially because this structure prevents any single person or group of people from accumulating and abusing excessive power.[34] This constitutional structure reflects the premise that a legal system should provide institutional constraints on the decisions and actions of those who operate the specific legal institutions within the system. It is precisely because individuals or groups of individuals cannot be expected to consistently apply and conform to the principles underlying a legal system that the constitutional structure limits and guides the power of legal actors to wield legal authority.

To say that a legal institution in the United States is constitutional is to say that it comports with the requirements of the Constitution as

33. BLACK'S LAW DICTIONARY 306 (7th ed. 1999) (defining "constitution"); 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 489 (1993) (same).

34. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 3.5 (6th ed. 2000); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 2-5 (2d ed. 1988).

a set of principles that governs the design and implementation of legal institutions of the United States. Legal institutions are developed and applied for the governance of human beings who use institutional structures partially to correct for the harm caused by human corruption and fallibility. These institutions are valuable partially because they provide a structure intended to reduce the effects of the errors committed by the fallible and sometimes corrupt human beings who design, interpret, and apply them. Specific legal institutions guide and limit the decisions and actions of the human beings who apply them or are subject to them. The Constitution provides a more general structure that guides and limits the design and implementation of those specific legal institutions.[35] Thus, to say that a legal institution is constitutional only if it is invariably applied exactly as required by the underlying constitutional principles is to say that it is constitutional only if applied in conditions that do not involve the human fallibility and corruption that these institutions are designed to address. That is, it is to say that the institution is constitutional only in conditions that do not arise in the circumstances in which legal institutions, including the Constitution, operate. In short, a standard of constitutional adequacy that accepted a legal institution as constitutional in practice only if it comported exactly with the underlying principles that render it constitutional in principle would accept legal institutions as constitutional only in circumstances that do not arise for legal institutions, including the Constitution. Such a standard would be incoherent.

A similar analysis applies to the moral justification of legal institutions. The principles of political morality underlying the design and operation of legal institutions address the moral justification of certain forms of political organization. In one classic formulation of the question addressed by theories of political morality, these theories ask how we should live.[36] Although moral theories address the broad range of human life, including individual and social perspectives, theories of political morality address questions regarding how we collectively ought to live. These questions include those addressing the legitimate form, functions, and limits of the State, with particular attention to the exercise of coercive force by political institutions. They also address the defensible relationships among various political institutions as well as the defensible relationships between the individual and the State.[37] These theories formulate and defend political institu-

35. *Id.*

36. PLATO, REPUBLIC 352d (G.M.A. Grube trans., 1974); BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 1-21 (1985).

37. PETER A. ANGELES, THE HARPERCOLLINS DICTIONARY OF PHILOSOPHY 233 (2d ed. 1992); DICTIONARY OF PHILOSOPHY 257-58 (Dagobert D. Runes ed., rev. ed. 1983); THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 718-20 (Robert Audi ed., 2d ed. 1999).

tions that enable us to live morally just human lives in interaction with others within and among societies. Any plausible approach to political morality must prescribe and defend social or legal institutions that human beings can operate in such a manner as to facilitate morally defensible human lives. Thus, these institutions must take a form that renders them accessible to fallible human beings. A moral justification that applies only to institutions that are applied in perfect compliance with that justification fails to address the circumstances in which morality is relevant. That is, such a justification does not address the fundamental question regarding how *we*, as fallible human beings, ought to live.

B. CP Kills People

A critic might respond to this argument from fallibility in the following manner. This argument that legal institutions, including the Constitution, necessarily function in circumstances of fallibility, and thus of imperfect application, may apply to most institutions. CP is an exception, however, because CP kills people. Because CP involves killing human beings, a justifiable institution of CP must meet extremely stringent standards of constitutionality and of moral justification. An institution of CP can meet these elevated standards of justification only if it complies precisely with the underlying principles of constitutionality and moral justification because errors involve unconstitutional or unjustified killing of human beings, including some who are not fully culpable for their crimes and some who are categorically innocent. Thus, any deviation in practice from the underlying justifications produces unjustified killings that render the institution in practice unjustifiable.

Consider the following exchange that might take place between such a critic and a defender of CP. The defender might respond to the critic's initial position in the following manner. It is clear, this defender might respond, that many institutions kill people. Military operations, law enforcement, and the use of deadly force in self-defense all involve the killing of human beings. More mundane legal institutions, such as those that set and enforce the speed limits or license the private operation of motor vehicles, cause the death of many human beings. In application, none of these institutions conforms precisely to the principles that render them constitutional and just in principle. Yet, we appropriately maintain them despite these distortions in application. To the extent that we can, we attempt to correct the practices that generate fatal errors, but the inevitability of fatal errors does not require that we abandon these institutions.

The critic might reply that these institutions are not comparable to CP. In contrast to these institutions, CP requires elevated standards of justification in principle and in application because CP involves the

deliberate killing of human beings. The defender might contend that many imperfect social and legal institutions, including just war, law enforcement, and the exercise of force in self-defense, involve the deliberate killing of human beings. For this reason, all should be practiced with extreme care, but all are just in principle, and, in some circumstances, all are just in practice despite our inability to achieve perfect conformity to the underlying principles of constitutionality or of moral justification. Thus, CP resembles other institutions that involve the deliberate killing of human beings in that it requires heightened standards of care in application but remains justified by the reasoning that renders it just in principle. This same reasoning precludes a requirement of perfect justice in application for any human institution.

The critic responds that CP must comply exactly with the standards of constitutionality and justice because, otherwise, if applied over time, it will eventually involve killing innocent human beings. The defender replies that many ordinary social and legal institutions, including those that set and enforce speed limits or license the private operation of motor vehicles, cause the death of innocent human beings. Thus, CP requires care comparable to that required by these institutions. The critic contends that CP differs from these institutions in that CP involves the deliberate killing of innocent human beings. The defender simply denies this assertion. CP does not involve the deliberate killing of innocent human beings. Rather, it involves the deliberate killing of people who are believed to be guilty. Given the fallibility of human beings, an institution of CP will be applied erroneously to some individuals who are innocent or who are insufficiently culpable to justify CP. This results in the deliberate killing of some individuals who are not in fact sufficiently culpable to justify CP by institutional standards, but it does not involve the deliberate killing of innocent people.

The critic responds that this distinction carries little significance. An institution of CP may not kill human beings specifically known to be innocent. We know, however, that our institution of CP is fallible, and thus, that if we continue to apply it, we will on some occasions apply it erroneously. Therefore, by maintaining an institution of CP, we operate an institution that we know must kill some innocent individuals eventually. To deny this would be to make the implausible claim that CP represents the only perfectly run institution in human history. The defender acknowledges the inevitability of some error in application, but he denies that this form of fallibility renders CP unjust in practice. He points out that the same reasoning would apply to military operations, law enforcement, self-defense, and the institutions that license motor vehicle ownership or set and enforce speed limits, among others. All these institutions and many more involve

operations that we know will kill some innocent people, but we maintain them because we think they are justifiable in light of all their costs, benefits, and functions.

That, replies the critic, is the key distinction. CP deliberately kills people, including some innocent people, and it does so for no legitimate social purpose. Life sentences could fulfill all the legitimate social functions served by CP, and it could do so without killing anyone, and especially without killing any innocent persons. The defender responds that this claim is simply false. CP serves a purpose that is not only legitimate but also critical for a society that represents defensible principles of political morality. That is, CP is necessary to do justice, and providing justice is a fundamental responsibility of the legal institutions of a just society.

This final exchange reveals the implicit core of the debate regarding the significance of distortions in application. It does so by explicitly articulating the underlying dispute regarding the justification of CP in principle. If CP is required by defensible principles of justice, then CP serves an important function in a society that strives to attain the status of a just society. Erroneous application will kill some people who do not deserve CP, including some categorically innocent individuals. CP shares this unfortunate product of human fallibility with many other social institutions, and, for this reason, we should design and implement each of these with great care in order to minimize avoidable errors. If CP is not necessary to do justice or to serve any other legitimate social function, in contrast, then any miscarriages of justice represent the taking of innocent life, or of insufficiently culpable human life, for no legitimate purpose. Given the inevitable fallibility of any human institution, it seems that any institution of CP that is actually applied must generate some miscarriages and that it therefore must result in the killing of some innocent humans, or some insufficiently culpable humans, for no legitimate purpose. Therefore, the underlying debate regarding the justification in principle of CP fulfills a crucial role in any reasoned debate regarding the significance of distortions in practice produced by human fallibility.

One might imagine many variations of this hypothetical exchange between the critic of CP and the defender. The precise issues of dispute might vary in a number of ways from those presented here. I claim only that most, and perhaps all, of these exchanges would share a common feature with the example presented here. Disputes that initially appear to address only the significance of distortions in application will reveal underlying differences regarding the justification in principle. The critic in this exchange, for example, rests his argument partially on the implicit premise that the justification for a legal institution of punishment must take a consequentialist form. That is, the

justification in principle must appeal to positive social consequences produced by the institution. The defender, in contrast, advances a deontic argument appealing to principles of justice that the defender understands as carrying justificatory force independent of any positive consequence produced.[38] Thus, the explicit dispute regarding the significance of distortions in practice masks implicit disputes regarding the justification of CP in principle and regarding the types of considerations that can justify institutions of punishment.

I do not purport to resolve these underlying debates regarding the justification in principle or lack thereof. The critical point for the purpose of this Article is that explicit disputes regarding the most defensible response to the inevitability of distortion in application mask implicit disputes regarding the justification of CP in principle. Rather than providing an opportunity to circumvent the highly contentious debate regarding the justification, or lack thereof, in principle, resolution of these debates regarding justification in practice requires that we explicitly address the underlying debates regarding the justification of CP in principle. Miscarriages or inappropriate application, and the empirical data providing evidence of such concerns, can carry significant force within a more comprehensive argument that includes an account of the justification in principle, but they do not enable us to resolve the dispute regarding the justification of CP merely on the basis of such distortions in practice without addressing the debate regarding the justification in principle. The following Part addresses arguments that appear to implicitly import positions regarding the justification in principle into the explicit arguments regarding the significance of distortions in practice.

IV. IMPLICIT APPEALS TO THE PREMISE THAT CP IS UNJUST IN PRINCIPLE

A. Discrimination in CP and in Education

Consider the apparent contrast between the common contention that CP should be abolished because discriminatory application renders CP unconstitutional or unjust in practice and the corresponding approaches to discrimination in the application of education. In *Brown v. Board of Education*, the Court found that 'separate but equal' public education deprives minority children of equal educational opportunities, even if physical facilities and other tangible factors are equal.[39] The Court held that purportedly 'separate but equal' education is inherently unequal and violates the Equal Protection

38. *See* THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, *supra* note 37, at 176 (contrasting consequentialism with deontological theories).

39. Brown v. Bd. of Educ., 347 U.S. 483, 493-95 (1954).

Clause of the Fourteenth Amendment of the Constitution.[40] In discussing appropriate remedies, the Court recognized the complexity of the situation, and it returned the cases to the district courts for monitoring of compliance with constitutional principles. Although the Court did not require specific actions on the part of the school boards, it discussed in general terms the responsibilities of the school boards to develop a transition to school systems that operated free of racial discrimination and to admit the plaintiffs to public schools on a racially nondiscriminatory basis.[41] Thus, the Court's discussion of remedy clearly contemplated a transition from a discriminatory public school system to a nondiscriminatory school system, or at least to a less discriminatory one. Nothing in the Court's opinion remotely suggests that the Justices ever considered the possibility of banning education in those jurisdictions as unconstitutional. Suppose that one were to argue that because education was provided in purportedly 'separate but equal' institutions and such institutions were unconstitutional, the Court should have declared education unconstitutional in those jurisdictions. That is, the Court should have ruled that because education in practice did not conform to constitutional standards, education violates the Constitution. Alternately, suppose that one were to argue that due to the discrimination in the application of education, the legislature should abolish education because education in practice fails to comply with defensible principles of justice.

At first glance, this argument appears parallel to the reasoning of Justice Blackmun in *Callins* and of Justice Marshall in *Furman*. In those opinions, the Justices reasoned that if an institution is applied in an arbitrary or discriminatory manner, that institution should be abandoned as unconstitutional in practice independently of any conclusion regarding constitutionality in principle. As far as I am aware, no one makes this argument regarding education. What reasoning renders this form of argument plausible in the context of CP but implausible in the context of education?

Set aside two responses that may initially appear attractive but fail to advance the inquiry. First, one might argue that we have the ability to eliminate or substantially reduce discrimination in education, but we lack the ability to comparably reduce discrimination in CP. Second, it might seem reasonable to contend that because erroneous application of CP causes unjustified deaths, CP differs from education in that CP qualifies as constitutional or as just only if discrimination in application can be eliminated rather than reduced. This second argument reduces to the requirement of perfection addressed in Part III, and I will not repeat that analysis here.

40. *Id.* at 495.

41. Brown v. Bd. of Educ., 349 U.S. 294, 299-301 (1955).

Consider the first argument based on the putative differences in our abilities to reduce or eliminate discrimination in practice. If there were good reason to believe this empirical claim about our abilities, it might carry substantial weight in the practical decision regarding reform or abolition of each institution. We have no obvious reason, however, to think that our abilities to reduce discrimination in application differ across the two institutions in this manner. Arguably, we have good reason to believe that this claim is not true. Early evidence, for example, provided evidence of discrimination in capital sentencing by race of perpetrator.[42] Later studies did not find evidence of such discrimination by race of perpetrator, but these studies did find evidence of discrimination by race of victim.[43] A more recent study did not reveal evidence of discrimination in capital sentencing by race of perpetrator or of victim, but it did find evidence suggesting discrimination by socioeconomic status of victim. This study also found evidence to support the interpretation that changes in the relevant statutes and court practices had produced improvement in the consistency of sentencing practices.[44] This pattern of evidence across studies does not decisively demonstrate that discrimination in capital sentencing can be eliminated, but it provides good reason to doubt the contention that capital sentencing practices are not susceptible to improvement.

B. 'We Shouldn't Be Doing That Anyway'

The tendency to think that we should respond to discriminatory application by correcting such practices in education but by abolition in CP may reveal an implicit assumption that education is a laudable endeavor but CP is a disreputable one. That is, we should abandon rather than attempt to improve the institution of CP because 'we shouldn't be doing that anyway.' Understood in this manner, the apparent argument from discriminatory application rests upon an implicit premise regarding the unconstitutionality or lack of justification in principle for CP.

This interpretation is inconsistent, however, with the apparent reasoning of Justices Blackmun and Marshall in *Callins* and *Furman*, respectively. As previously discussed, these opinions and similar commentary appear to advance the claim that distortion in application renders CP unconstitutional in practice independently of any putative resolution of the dispute regarding the constitutionality or justification of CP in principle. Similarly, some commentary addresses the justification of CP in a manner indicating that distortion in applica-

42. EJDP, *supra* note 32, at 140-49.
43. *Id.* at 149-60.
44. *Nebraska Study*, *supra* note 32, at 562-90 (race of victim); *id.* at 607-23 (socioeconomic status of victim); *id.* at 586-90, 625-32 (changes in statutes and court practices).

tion renders CP unjustifiable independently of justification in principle.[45] Furthermore, this interpretation shifts the debate from a claim about the significance of distortion in application to the constitutionality or justification of CP in principle. Rather than providing an argument that addresses CP in practice without resolving the apparently intractable questions regarding the constitutionality or justification of CP in principle, this argument assumes a particular resolution of those difficult questions of principle. Thus, it requires a persuasive argument in support of the contentious claim that CP is unconstitutional or unjust in principle.

Not only is this argument from discrimination in practice insufficient absent a persuasive argument regarding the lack of justification in principle, but it becomes superfluous if that necessary premise can be supplied. Insofar as the argument that distortions in practice render CP unconstitutional or unjust relies on the premise that CP is unconstitutional or unjust in principle, the distortions in practice become insignificant for the purpose of deciding whether we ought to retain CP. Establishing the underlying premise that CP is unconstitutional or unjust in principle would establish the conclusion that we should abolish CP as unconstitutional or unjust regardless of the distortions in practice.

Establishing that CP is constitutional or just in principle, however, does not carry corresponding significance in rendering CP in practice constitutional or just. Consider the constitutional question. As recognized by the Court in *Furman*, *Brown*, and other cases, an institution that conforms to the Constitution in principle can violate it in practice due to distortions in design and implementation. Thus, empirical studies demonstrating distortion of CP in practice should be of primary substantive interest to those who believe that CP is constitutional in principle. Empirical studies that provide evidence regarding CP in practice can advance our understanding of the relationship between the justification in principle and the form of the institution we actually apply. Thus, these studies can provide information regarding the manner in which the institution conforms, or fails to conform, to that justification in principle. They might also provide information regarding the reforms that can render an institution in practice more consistent with the principles that render it constitutional in principle.

Those who believe that CP is unconstitutional in principle, in contrast, should find that these empirical studies provide little of substantive interest regarding the question of retention or abolition. If CP is unconstitutional in principle, evidence that it is administered in a nondiscriminatory manner cannot remedy the defect in principle.

45. *See supra* note 29.

Alternately, if CP is unconstitutional in principle, evidence that it is administered in an arbitrary, discriminatory, or otherwise unjust manner is merely redundant for the purpose of establishing the illegitimacy of the institution. Those who believe that CP is unconstitutional in principle may find the results of some empirical studies demonstrating distortions in application to be of political or rhetorical interest, but the data provides these individuals little of substantive interest insofar as the question at issue is the justification of our current institutions of CP. Such data might remain informative regarding the manner in which the current institutions require reform to correct for distortions in application. Insofar as the data provides this type of information, it could be of significance regardless of one's belief regarding the constitutionality or justification in principle. Advocates and opponents of CP can agree that it ought not be applied in an unjust manner. The advocate would understand such application as distorting a just institution, and the opponent would understand it as exacerbating the injustice of an unjust institution.

C. Protecting the Victims of Illegitimate Discrimination

One might argue that discriminatory application renders CP, but not education, unconstitutional in practice because CP differs from education in the critical respect that discriminatory education is better for the victims of discrimination than no education at all, while discriminatory CP is worse for the victims of discrimination than no CP at all. That is, the context of discrimination is such that terminating the discriminatory educational institution injures the victims of discrimination, but terminating the discriminatory institution of CP benefits the victims of discrimination.

This argument carries potential weight, but its persuasive force depends on the precise nature of the discrimination, the identification of the victims of that discrimination, the potential for amelioration within the institution, and the relationship between the discrimination and the underlying justification that renders CP constitutional or just in principle. In the circumstances addressed by *Brown*, the victims of the discrimination were the innocent children receiving education inferior in terms of the quality of resources, the implicit derogation of their standing, or both. Insofar as the harm took the form of derogation of standing, it extended to the broader population of black citizens from which those children were drawn. Regarding the discrepancy in educational resources, eliminating discrimination in education would ordinarily improve the educational resources available to the disadvantaged students, although it would not necessarily do so. Alternately, if the educational resources were truly separate but equal, eliminating discrimination in placement renounces the denial of equal standing implicit in such formal separation. Thus, re-

ducing or eliminating discrimination in education ordinarily improves the plight of the victims of the discrimination, but eliminating the social institutions of education would further undermine the educational resources available to the victims.

Although it might seem obvious that abolishing CP would improve the plight of the victims of discrimination in the application of that institution, this proposition is less clear than it might initially appear. The victims of discrimination in the application of CP are more difficult to identify. Some recent evidence of discrimination in CP takes the form of discrimination regarding certain sets of victims, rather than perpetrators. This evidence suggests that discrimination in sentencing occurs on the basis of the race or socioeconomic status of the victim of the murder.[46] It is not at all clear that eliminating CP provides an appropriate remedy for this type of discrimination. One might argue that it does, but this argument would require clear identification of the victims of discrimination and reasoning from the underlying justification in principle. This reasoning would attempt to show that eliminating CP would result in a more nearly just situation than the alternative remedy of applying CP in a more defensible manner.

There appear to be at least two plausible sets of victims of the discriminatory application of CP by race or socioeconomic status of victim. One might argue that these institutions discriminate against the convicted killers who are sentenced to CP when similarly situated killers of different victims receive less severe sentences. Alternately, one might argue that the victims of this discrimination are the victims of the killers who are not sentenced to CP when other killers of relevantly similar victims are so sentenced. The category of victims in this context might include the direct victims of the murders and their survivors. This discrepancy in sentencing might be understood as discriminating against these victims by expressing disrespect for these victims through the application of lesser sentences that suggest that the murders of these victims constitute lesser wrongs than the murders of more important or more valued victims.

1. Convicted Murderers as the Victims of Discrimination

Consider first the claim that CP discriminates against murderers who are sentenced to death when similarly situated murderers of different classes of victims are sentenced to less severe sentences of incarceration. It is difficult to sympathize with murderers who had the opportunity to protect themselves from such discrimination simply by refraining from committing murder. Discrimination in application remains a serious defect in the institution, however, because it consti-

46. *See* sources cited *supra* note 32.

tutes a failure of the institutional structure to conform to the principles that justify that structure. Thus, even if this form of discrimination does not wrong the murderers who receive capital sentences, it represents a failure of the institutional function of disciplining the manner in which the state exercises coercive force against its citizens. This provides a powerful reason why we should attempt to correct such institutional defects. It is not, however, an argument that addresses the current concern regarding the protection of innocent victims of discrimination. Rather, it addresses the importance of principled consistency in the manner in which we collectively discipline our exercise of coercive force through the design and application of coercive institutions. Part V addresses this issue.[47]

Justice requires that a person receive the treatment that he or she is due. It is applied in comparative and noncomparative formulations.[48] The formal principle of noncomparative justice requires that each individual receive treatment appropriate to that individual's merit or desert. Application of that formal principle requires some substantive standards of justice for a particular purpose. These substantive standards identify the specific bases in merit or desert that serve as the criteria of justice for that purpose.[49] Retributive justice addresses the justification of punishment as an institution and the application of that institution to particular offenders for particular offenses. Retributive justice in this broad sense includes all theories of the justification of punishment, including but not limited to those that justify punishment by guilt, desert, or culpability. Theories of the latter type are ordinarily understood as retributive theories of punishment and are included within the broader field of retributive justice.[50] For the purpose of criminal sentencing, noncomparative justice requires that the individual offender receive the punishment appropriate to that offender's merit as defined by the applicable criteria of justified punishment.

Comparative justice requires comparable treatment for members of a class where that class is defined by some criteria of justice for a particular purpose. Evaluation of comparative justice requires two comparisons. The first involves comparison of the individuals on the applicable criteria of justice for the purpose in question, and the sec-

47. Some of those who are convicted of murder are actually innocent victims of miscarriages of justice, but this is a separate issue addressed in Part III. This subsection addresses discriminatory sentencing of guilty offenders.

48. JOEL FEINBERG, FREEDOM AND FULFILLMENT 266 (1992); THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, *supra* note 37, at 456.

49. FEINBERG, *supra* note 48, at 268.

50. THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, *supra* note 37, at 456; FEINBERG, *supra* note 48, at 268-69; Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179 (Ferdinand Schoeman ed., 1979).

ond involves comparison of treatment. Dissimilar treatment of those who do not differ in a corresponding manner on the applicable criteria of justice constitutes comparative injustice. Alternately, similar treatment of those who differ on the applicable criteria constitutes comparative injustice.[51] Arbitrary or discriminatory departures from consistent application of systemic sentencing criteria constitute comparative injustice by systemic standards. That is, variations in sentencing that do not correspond to justificatory differences as measured by systemic criteria of noncomparative justice represent comparative injustice. Thus, comparative and noncomparative justice are conceptually related as applied to retributive justice generally and capital punishment specifically. The applicable criteria of noncomparative justice provide the standards by which individuals are compared for the purpose of comparative justice.[52] In short, comparative and noncomparative justice in capital sentencing are not only compatible, but consistent application of the latter constitutes the former. Any criminal justice system that consistently applies its criteria of noncomparative justice does comparative justice by systemic standards, and any failure of comparative justice represents a departure from the standards of noncomparative justice in at least some cases.[53]

Discriminatory application violates comparative justice because it differentiates among offenders on the basis of morally irrelevant factors, such as race or socioeconomic status of victim, rather than on the basis of the morally relevant properties that justify punishment. Similar treatment of offenders who differ according to the morally relevant criteria also violates comparative justice by treating those individuals in a manner that fails to reflect the morally relevant differences among them. It is precisely because comparative justice requires consistent application of the standards of noncomparative justice that either dissimilar treatment of relevantly similar cases or similar treatment of relevantly dissimilar cases violates comparative justice. Either pattern reveals a failure to consistently apply the relevant criteria of justice, and either pattern thus reveals a failure to accurately apply the criteria of noncomparative justice to at least some of the cases.

---

51. FEINBERG, *supra* note 48, at 267-71.

52. *Id.* at 281.

53. Some theorists would argue that this pattern applies to comparative and noncomparative justice generally. These theorists contend that noncomparative justice addresses the just treatment of individuals according to the applicable standards of individual merit or desert. Comparative justice represents an attribute of institutions that consistently treat individuals as required by the applicable criteria on noncomparative justice. Phillip Montague, *Comparative and Non-Comparative Justice*, 30 PHIL. Q. 131 (1980). I take no position here on this broad question because this Article addresses only retributive justice as applied to capital sentencing.

Attempting to correct discriminatory application of CP through abolition of CP might either correct or exacerbate the pattern of injustice in application. If defensible principles of criminal sentencing support the contention that non-capital sentences are sufficient to treat all murderers in a manner consistent with noncomparative justice, and if abolition of CP would provide more consistent application of the principles of noncomparative justice by reducing discrimination in sentencing, then abolition would promote comparative and noncomparative justice in sentencing. Alternatively, if defensible principles of criminal sentencing require CP in order to treat some murderers in a manner consistent with the standards of noncomparative justice, then abolition of CP would increase consistency in sentencing but exacerbate the problem of injustice in sentencing. In these circumstances, abolition would exacerbate comparative and noncomparative injustice. It would promote comparative injustice by imposing similar sentences on relevantly dissimilar offenders. It would promote noncomparative injustice by categorically preventing sentencing in accord with the applicable principles of noncomparative justice for that set of murderers whose crime and culpability require CP under those principles of noncomparative retributive justice.

Some might argue that the most defensible principles of noncomparative retributive justice preclude CP. Others might argue that the most defensible principles of noncomparative retributive justice require CP or allow it as within the range of just punishment for certain crimes. The ongoing debate regarding the justification in principle of CP represents an extended and unsettled dispute regarding this issue.[54] I make no attempt in this Article to resolve this question regarding the justification of CP in principle. Neither do I advance a proposal addressing the debate regarding the most defensible principles of noncomparative retributive justice. The critical point for the purpose of this Article is that the most defensible approach to rectifying discriminatory application of CP to some murderers while withholding it from other similarly situated murderers depends partially on the underlying argument regarding the justification in principle, or the lack thereof, for CP. Thus, insofar as the victims of discriminatory application are understood to be those convicted murderers who receive CP when other similarly situated murderers do not, the need to rectify that distortion in practice does not enable us to circumvent the debate regarding the justification in principle. Rather, it emphasizes, once more, the need to address distortions in practice through rigorous application of the justificatory argument regarding the institution in principle.

54. *See, e.g.*, LOUIS P. POJMAN & JEFFREY REIMAN, THE DEATH PENALTY: FOR AND AGAINST (1998); ERNEST VAN DEN HAAG & JOHN P. CONRAD, THE DEATH PENALTY: A DEBATE (1983).

2. Justice and Mercy

Some Supreme Court opinions suggest that capital sentencers must retain the authority to exercise mercy in capital sentencing decisions.[55] According to one common interpretation, the capital sentencing process includes a narrowing function, which narrows the class of offenders who are eligible for CP, and a selection function, during which the sentencer exercises discretion in selecting or rejecting CP as the appropriate sentence for each of those offenders who are eligible for CP.[56] This discretion provides the sentencer with the opportunity to exercise mercy toward some of those who are eligible for CP. It is not entirely clear whether these opinions contemplate the exercise of mercy as fine-grained consideration of the relevant reasons for exercising leniency in justice or as a basis for withholding CP from some of those who deserve it in justice. Although some opinions tend to discuss justice, mercy, or both without drawing a clear distinction between the two, mercy is ordinarily understood as involving departure from justice out of compassion in the form of treatment better than the individual can demand in justice.[57] If mercy is understood in this manner, decisions to withhold CP based on mercy would involve departures from sentences based strictly on the applicable principles and criteria of retributive justice.

If these opinions discuss mercy as fine-grained justice, the argument in subsection IV.C.1 applies to the exercise of mercy in that the discriminatory exercise of mercy constitutes a violation of comparative justice, and the most defensible approach to correcting that violation depends partially upon the underlying principles of retributive justice in principle. Alternately, if mercy is understood as departure from justice out of compassion, one needs a justification for treating some people in a manner that departs from justice and some criteria or guidelines regarding the application of such treatment. Insofar as sentencing criteria and guidelines provide a principled basis for the exercise of such mercy, capital sentencing can allow for the exercise of mercy in a manner that conforms to the principles of comparative justice in a broad sense in which comparative justice includes the exercise of justice and of principled departures from justice.[58]

55. Penry v. Lynaugh, 492 U.S. 302, 327 (1989) ("[T]here is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant."); Gregg v. Georgia, 428 U.S. 153, 203 (1976) (Stewart, J., plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (Stewart, J., plurality opinion).

56. Lowenfield v. Phelps, 484 U.S. 231, 244-46 (1988).

57. ROBERT F. SCHOPP, JUSTIFICATION DEFENSES AND JUST CONVICTIONS § 6.3.5 (1998).

58. Robert F. Schopp, *Reconciling "Irreconcilable" Capital Punishment Doctrine as Comparative and Noncomparative Justice*, 53 FLA. L. REV. 475, 506-08 (2001).

A pattern of sentencing that reflects the selective exercise or withholding of mercy on the basis of illegitimate factors, however, would undermine comparative justice by providing dissimilar treatment for relevantly similar cases. In these circumstances, elimination of CP would promote conformity with the applicable principles of justice if two conditions were met. First, non-capital sentences must be subject to application in a manner more consistent with legitimate sentencing criteria than are capital sentences. Second, non-capital sentences must fall within the range of justified punishments according to the applicable principles of noncomparative retributive justice. Abolition would exacerbate the problem of failure to conform to the applicable principles of noncomparative retributive justice, in contrast, if non-capital sentences were inadequate to satisfy those principles as applied to capital crimes such as aggravated murder. In such circumstances, all offenders would receive sentences that fail to conform to defensible principles of noncomparative justice. Finally, if both capital and non-capital sentences fell within the range of sentences that conformed to the applicable principles of noncomparative justice, and both were equally subject to distortion of comparative justice through arbitrary or discriminatory application, abolition would fail to address the violation of comparative justice. One might defend abolition in these circumstances, however, on the basis of a preference for nonfatal errors. Thus, once again, the argument from distortion in application requires, rather than bypasses, an analysis of the justification in principle.

3. *Murder Victims and Survivors as the Victims of Discrimination*

Consider next the claim that the discriminatory application of CP by category of victim discriminates against the victims (immediate and extended) whose murders are treated as less important than other similar murders in that their murderers receive lesser penalties. According to expressive theories of punishment, criminal punishment expresses condemnation of criminal conduct and of culpable perpetrators. Condemnation includes reprobation as disapproval and resentment as anger at the injustice done by the culpable criminal.[59] This expression of condemnation vindicates the standing of the perpetrator as a responsible agent who has the capacities needed to function as an accountable agent of the criminal law. State response to harmful conduct through an insanity acquittal and post-acquittal commitment, in contrast, exempts the offender from punishment precisely because he committed the crime in a state of impairment that rendered him unable to function as an accountable agent. Thus, conviction and punish-

59. JOEL FEINBERG, DOING AND DESERVING 95-101 (1970).

ment reaffirm the offender's standing as an accountable agent. Furthermore, by maintaining separate institutions of coercive behavior control for those who possess the capacities of accountable agency and for those who lack such capacities, a state affirms the special standing of accountable agency.[60]

Criminal punishment vindicates the standing of the victim by condemning violations committed against that victim. If the state refrains from prosecuting and punishing crimes against some classes of victims, such as prostitutes or transients, the state effectively denies the equal standing of those victims and of others who share the traits that define those classes.[61] Similarly, lesser punishment of criminals who commit offenses against some victims or classes of victims, as compared to other victims or classes of victims of similar crimes and perpetrators, expresses lesser condemnation of those offenses, and thus, lesser standing or value for those victims.

Correcting such discriminatory punishment and condemnation requires consistent punishment expressing consistent condemnation of relevantly similar murderers. Such consistent punishment expresses consistent condemnation of the criminal conduct and of the culpable perpetrators as well as consistent vindication of the victims of those crimes and perpetrators. Thus, consistent application of the principles of noncomparative retributive justice generates comparative justice and corrects unjustified variations in the official expressions of condemnation toward culpable offenders and of vindication toward victims. At first glance, it appears that the state can correct such discriminatory condemnation and vindication either by applying CP to all offenders who commit sufficiently culpable murders against any victims or by abolishing CP and consistently applying some lesser punishment to all offenders who commit such murders against any victims.

In order to determine whether either of these two alternatives resolves discriminatory punishment in a satisfactory manner, one must perform a more complete analysis of the expressive function of punishment generally and of CP specifically. Eliminating CP in favor of life sentences for all murderers of a given level of culpability would provide comparative justice for the murderers in the form of similar treatment for similar offenders, and it would provide comparative justice for the victims in the form of similar vindication. This approach might support or undermine noncomparative justice, however, depending on the underlying arguments regarding the justification in principle of CP. If the alternative sentence that replaces CP provides appropriate condemnation of the offender and the offense, it might promote com-

60. SCHOPP, *supra* note 57, § 3.3.2.

61. *Id.*

parative and noncomparative justice by treating all murderers as they deserve according to defensible standards of retributive justice. In these circumstances, the alternative punishment would also provide comparative and noncomparative justice to victims by expressing condemnation of the offenses against all victims that accurately recognizes the wrong done to them.

Alternately, this approach might provide consistent dispositions by consistently violating defensible criteria of noncomparative justice, and thus, by consistently denigrating the standing of persons as manifested in both the offenders and the victims. Kant's famous passage regarding the obligation to execute the last murderer in the prison before the disbursement of an island society might reasonably be understood as a classic statement of this interpretation of abolition as the abandonment of defensible standards of noncomparative justice.[62] This passage suggests that the failure to execute the last murderer in the prison would leave a stain of "bloodguilt" on the people because they had failed to punish that murderer for that murder as the murderer deserved.[63] Thus, the failure to execute would implicate the citizens because that failure would constitute a violation of noncomparative justice, rather than a failure of comparative justice due to any disparity between his punishment and that of any other criminals. According to this understanding of the defensible principles of noncomparative retributive justice, consistent withholding of CP from fully culpable murderers would constitute an ongoing pattern of noncomparative injustice.

I make no attempt to defend or refute Kant's theory of punishment generally or of CP specifically. Neither do I attempt to advance a theory of punishment contending that abolition of CP would either conform to or violate defensible standards of noncomparative justice. For the purpose of this Article, the critical point is that, once again, a defensible resolution of the injustice in practice represented by empirical evidence of discriminatory application requires integration of the empirical evidence with the justification in principle of criminal punishment generally and of CP specifically. Either abolition or revision of the current pattern of application might enhance or undermine noncomparative justice. A persuasive defense of either interpretation requires integration of the empirical evidence regarding CP in practice with the underlying justification in principle.

In short, a consistent pattern emerges. Empirical studies can provide information regarding the manner in which the institution is applied. Understanding the justificatory significance of that data and the most defensible manner of responding to it requires interpretation

62. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100-02 (J. Ladd trans., 1965).
63. *Id.* at 102.

in light of the underlying principles of comparative and noncomparative justice. Thus, the persuasive force of the arguments for abolition of CP or for reform of CP due to discriminatory application depends in part on the underlying justification of CP in principle. Rather than providing a resolution that avoids the need to address the difficult questions of justification in principle, these arguments from distortion in practice require integration with the underlying justification in principle.

V. DISTORTIONS IN PRACTICE AS UNDERMINING THE JUSTIFICATION IN PRINCIPLE

An alternative type of argument for abolition from evidence demonstrating distortion of CP in practice would contend that this evidence undermines the specific reasoning that justifies CP in principle. This form of argument would articulate a justification in principle for CP and demonstrate that the distortions in practice preclude application of that justification to this institution of CP. One might advance such an argument regarding any arguable justification in principle. For the sake of brevity, I only sketch the general structure of such an analysis as applied to one consequentialist example and one deontic example.

A. Consequentialist Justification

Consider a justification in principle based strictly on a consequentialist argument regarding the protection of innocent human life. This argument would identify the protection of innocent human life as the only or as the primary consequence of value, and it would justify CP in principle on the premise that CP produces a net increase in the protection of innocent human life through the combined effects of incapacitation, deterrence, expression of condemnation, and any other mechanism through which CP might generate a net increase in the protection of innocent human life. Admittedly, this example markedly oversimplifies the argument. A justification that vested value only in protecting innocent human life would be implausible because it would fail to address many other significant consequentialist considerations. These might include, for example, the relative costs and benefits in the form of human pleasure, pain, satisfaction, lost opportunities, and others. A more comprehensive consequentialist argument would accommodate a more complete set of consequentialist considerations, but it would have to address the relationships among the various positive and negative consequences.

The required analysis becomes much more complex when one attempts to integrate a comprehensive set of arguably relevant consequentialist and deontic considerations. For the purpose of this Article,

I sketch a very simplified version of a consequentialist argument, followed by a comparably simplified version of a deontic argument. I make no claim that either provides a persuasive analysis. These brief treatments purport only to illustrate the general structure of such arguments. This simplified consequentialist argument depends on empirical premises regarding the effects of CP in comparison to available alternatives. Thus, empirical evidence regarding these effects directly informs the underlying justification. Empirical evidence regarding deterrence, brutalization, incapacitation, miscarriages of justice regarding innocent defendants, or any other factors relevant to a net cost or benefit in the protection of innocent life would be relevant to such an argument.[64] Evidence suggesting, for example, that the combined effects of brutalization and miscarriages cost more innocent lives than were saved through incapacitation and deterrence would undermine this justification in principle for CP.

Such evidence would not be decisive in isolation, however, because it would be consistent with the conclusions that CP should be abolished or that the current practices of CP should be revised in such a manner as to improve the net protection of innocent life. Thus, additional evidence demonstrating our inability to revise the institution in a manner expected to produce a net increase in the protection of innocent life would be necessary to establish the argument for abolition from this evidence of distortion in application. Such evidence might demonstrate that sufficient improvement in application is impossible due to inherent fallibility in our ability to identify all and only those who are guilty of capital murder. Alternately, such evidence might demonstrate that such improvements are possible in principle but that financial or political factors render our institutions unable or unwilling to accomplish them. Finally, additional justificatory argument must show that no alternative justification suffices to justify CP in these circumstances.

Thus, any argument of this type would include at least the following components. First, it would advance a justificatory argument supporting a particular consequentialist justification in principle for CP. Second, it would review empirical evidence demonstrating that the in-

64. For discussion of research regarding deterrence, incapacitation, and brutalization, see, for example, William C. Bailey & Ruth D. Peterson, *Murder, Capital Punishment, and Deterrence: A Review of the Literature*, *in* THE DEATH PENALTY IN AMERICA 135 (Hugo Adam Bedau ed., 1997); James A. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, *in* THE DEATH PENALTY IN AMERICA 162 (Hugo Adam Bedau ed., 1997). For discussion of miscarriages of CP, see, for example, STAFF OF SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS, HOUSE JUDICIARY COMMITTEE, 103D CONG., STAFF REPORT, INNOCENCE AND THE DEATH PENALTY: ASSESSING THE DANGER OF MISTAKEN EXECUTIONS, *reprinted in* THE DEATH PENALTY IN AMERICA 344 (Hugo Adam Bedau ed., 1997).

stitution in practice does not meet the conditions required by that consequentialist justification. Third, it would review empirical evidence demonstrating that we lack the ability or willingness to correct those conditions in order to render them consistent with that consequentialist justification in principle. Fourth, it would provide empirical evidence supporting the contention that some available alternative to CP would more closely approximate the conditions that satisfy this consequentialist justification in principle. Fifth, it would refute alternative justificatory arguments in order to demonstrate that alternative justifications fail, either in principle or in the circumstances encountered. These five steps would generate the conclusion that although CP is justified in principle by the consequentialist value for the protection of innocent human life, neither that justification nor any alternative justification justifies the current institution of CP in practice or any practically available modification of that institution. Thus, it would provide a consequentialist argument for abolition in practice due to the failure of the applied institution to fulfill the requirements of the proffered consequentialist justification in principle.

B. Deontic Justification

The significance of empirical studies for consequentialist arguments seems reasonably clear because such justifications depend on the thesis that an institution produces a net improvement in some valued result. Thus, empirical evidence supporting or undermining that thesis is directly relevant to the justificatory argument. The relevance of empirical evidence to deontic justifications can be less direct because the arguments do not appeal to expected consequences as central to the justification. Consider, for example, a deontic argument in principle for CP that rests upon the contention that we have an obligation to do justice by treating people as they deserve and the premise that some murderers are so culpable that they can be treated as they deserve only through the application of CP.[65]

One might contest this justification in principle by attempting to refute the claim that some murderers can be treated as they deserve only through CP or by attempting to refute the claim that we have an obligation to treat people as they deserve. This latter argument might deny any such obligation, or it might contend only that this obligation is overridden by some more fundamental obligation that precludes CP.[66] These arguments would address the putative justification in principle, however, rather than attempting to show that injustice in practice requires abolition of an institution justified in principle. Arguments such as the following, in contrast, would appeal to empirical

65. POJMAN & REIMAN, *supra* note 54, at 27-33.
66. *Id.* at 87-100.

evidence in order to contend that distortions in practice undermine this justification in principle.

Empirical evidence might demonstrate that fallibility in making factual determinations generates miscarriages that result in severe departures from the treatment that some individuals deserve. This evidence might identify categorical miscarriages in the form of mistaken execution of entirely innocent individuals, or it might identify relative miscarriages by demonstrating that some individuals who received CP were not sufficiently culpable to deserve CP by the applicable criteria of desert.[67] Such evidence might support a more comprehensive argument contending that limitations in our ability to accurately identify those who deserve CP generate capital sentencing patterns that undermine, rather than augment, the effort to treat people as they deserve. Empirical evidence that jurors are unable to comprehend jury instructions or to accurately identify and weigh aggravating and mitigating circumstances might support a comprehensive argument contending that limits on juror comprehension generate capital sentencing patterns that deviate substantially from those justified by desert as defined by systemic standards.[68] The recent Nebraska study provides evidence suggesting discrepancy in sentencing according to socioeconomic status of victims.[69] Such evidence might play a role in a larger argument contending that socioeconomic status or other characteristics irrelevant to desert distort capital sentencing in a manner that renders CP in practice inconsistent with the putative justification in principle based on the obligation to treat people as they deserve.

As with the consequentialist arguments, such evidence of distortion in practice can justify abolition only in the context of a more comprehensive analysis. That analysis would provide persuasive reason to believe that (1) the duty to treat people as they deserve justifies CP in principle; (2) the empirical evidence demonstrates that current institutions of CP fail in practice to treat people as they deserve according to criteria identified in step one; (3) our political and legal structure is unable or unwilling to correct these defects to the degree that would render the practice consistent with the justification in principle; (4) some available alternative to CP would more closely approximate treatment according to desert than does any attainable practice of CP; and (5) alternative justifications for CP in practice fail. When these conditions are met, the empirical evidence contributes to

67. INNOCENCE AND THE DEATH PENALTY: ASSESSING THE DANGER OF MISTAKEN EXECUTIONS, *supra* note 64.

68. *See, e.g.*, Diamond & Levi, *supra* note 6, at 224-26 (discussing juror comprehension of capital sentencing instructions regarding aggravating and mitigating factors).

69. *Nebraska Study*, *supra* note 32, at 608-23.

a more comprehensive analysis demonstrating that the distortion in practice undermines the justification in principle. Thus, the analysis generates the conclusion that although CP is justified in principle, it is not justified in practice.

C. Common Pattern of Interpretation

I make no claim that either the consequentialist or the deontic arguments sketched in the two prior sections justifies, or fails to justify, abolition in practice. Such an argument would extend well beyond the scope of this Article. It is the common structure of such arguments that is of central concern to the analysis presented here. In each case, the empirical evidence must be embedded in a more comprehensive analysis in order to support the conclusion that distortions in practice undermine the proffered justification in principle. This more comprehensive analysis must include at least the following elements: (1) an articulation of a justification in principle, (2) empirical evidence demonstrating distortion in practice that undermines the justification in principle, (3) a demonstration that these defects are not amenable to correction, (4) a demonstration that some available alternative to CP more closely complies with the articulated justification in principle than does the attainable practice of CP, and (5) a demonstration that alternative justifications in principle fail.

This form of analysis requires inquiry regarding the significance of the distortion in practice for the justification in principle. Thus, the comprehensive analysis requires assessment of the putative justification in principle and of any alternative justification in principle. As revealed in each of the prior Parts of this Article, an argument that initially appears to provide a means to circumvent the apparently intractable dispute regarding the justification in principle of CP actually requires integration of the empirical data relevant to CP in practice with the more comprehensive analysis of the justification in principle. Thus, the empirical data can play an important role in our comprehensive evaluation of CP, but it cannot do so in isolation from the justificatory analysis of CP in principle. As with other daunting but important tasks, we simply cannot avoid engaging the fundamental questions regarding justification in principle.

VI. CONCLUSION

Evidence of unjust application of CP can inform efforts to improve the manner in which we apply that institution. The significance of such evidence for the contention that we should abolish CP is less clear. Arguments appealing to the implicit premise that CP is constitutional or just only if applied without error are incoherent. Alternately, some apparent arguments for abolition due to distortion in

practice implicitly appeal to the premise that CP is unconstitutional or unjust in principle. Insofar as these arguments rest on such premises, they require persuasive reasoning to support those premises. If this persuasive reasoning is available, it supports abolition in principle, rendering the evidence of distortion in practice superfluous for the substantive justification. Arguments contending that distortions in practice undermine the justification in principle of CP require articulation of that justification in principle, demonstration that these distortions defeat that justification, and demonstration that abolition more nearly conforms to that justification than does the current distorted practice of CP or any available variation in application.

As discussed in Part II, the reasoning of Justices Blackmun and Marshall apparently relied on the implicit premise that the evidence of ongoing distortion in application provided the basis for abolition in practice, independently of a resolution of the apparently intractable disputes regarding the justification in principle. Unfortunately, the analysis presented in this Article suggests that we cannot avoid addressing that extended debate. In short, evidence of distortion in practice provides good reason to correct those distortions, but in order to support abolition, that evidence must be integrated with more comprehensive arguments regarding the justification in principle. Thus, the empirical evidence of distortion in application does not enable us to resolve the difficult questions regarding retention or abolition of CP without addressing and resolving the difficult debate regarding the constitutionality or justification of CP in principle.